

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460**

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

November 6, 1992

MEMORANDUM

SUBJECT: Clarification of EPA Policy on Authorizing Incomplete or Late "Clusters" Under 40 C.F.R. 271.21 and Availability of Public Information under RCRA Section 3006(f)

FROM: Sylvia K. Lowrance, Director
Office of Solid Waste

TO: Hazardous Waste Management Division Directors
Regions I-X

Several Regional offices have asked the Office of Solid Waste (OSW) and the Office of the General Counsel (OGC) whether EPA has the authority to authorize State programs under RCRA Section 3006 where States fail to submit necessary programs established in the changes within the regulatory deadlines established in the "cluster" rule. (40 C.F.R. §271.21). This issue arose when, under the delegation of authorization decisions to the Regions, several Regional Counsels were concerned whether they could approve clusters that were late or both late and incomplete. EPA has strong policy reasons for authorizing States for as many as possible, whether they are included in a late cluster or a partial cluster. This is especially true for the rules adopted under statutory authority predating the 1984 amendments--so called Non-HSWA rules/clusters-- as those provisions cannot take effect as RCRA requirements in States with base authorization until those States revise their programs and receive EPA program approval. OGC and OSW reviewed the Regions' expressed concerns and believe that EPA has the authority to make authorization approval decisions despite late submission of applications and the omission of some provisions from a cluster.

Background - History of the Cluster Rule

EPA has always required States that have obtained RCRA authorization to modify their programs to reflect new RCRA regulations that make the Federal program more stringent. EPA's first set of rules for State authorization in 1980 required States to submit requests for program modifications within one year of the adoption of each new, more stringent rule. (Two years were available for States that needed to enact legislation.)

By 1986, however, EPA found that the pace of Federal rule changes and the intricacies of State legislative and regulatory procedures made separate one-year deadlines for each rule unworkable for the great majority of States. To provide relief, in 1986 EPA promulgated a new

rule allowing States to "cluster" at least one year's worth of Federal rules and submit a single modification request for the entire cluster. 40 C.F.R. 271.21(e). The 1986 scheme effectively extended the deadlines for State action on almost all of the rules in the cluster. In addition, the new rule offered States an opportunity to seek a six-month extension of any cluster deadline. If a State needed more time after this extension expired, EPA could place the State on a schedule of compliance that provided up to 12 more months for submittal of the revision. If a State failed to meet the deadline in its compliance schedule, EPA has discretion to withdraw authorization for the State's entire RCRA program.

The opportunities to extend schedules or impose compliance schedules provided in the cluster rule have expired for the first few clusters of Federal rule changes. A number of States have not submitted complete clusters to EPA within those deadlines. Some States have submitted revisions that adequately addressed all of the Federal rules in the cluster, but missed the last possible deadline extension. Other States have submitted clusters that were not only late, but incomplete--either they failed to address one of the new Federal rules in the cluster, or the changes they submitted were not approvable.

Discussion

OGC has reviewed the statute and regulations pertaining to State program authorization. The statute, RCRA §3006(b), does not clearly establish deadlines for the submission of State program revisions or mandate particular consequences for a failure to meet such deadlines. The deadlines and content requirements are addressed in the rule itself. The cluster rule also provides that EPA may choose to withdraw a State's program if a State fails to meet those requirements. Neither the statute nor the rule, however, addresses what EPA may do if it decides that it does not wish to withdraw a program.

OSW has decided to interpret this silence as leaving the issue of approval to EPA's discretion. Rules adopted under statutory authorities that pre-date the 1984 amendments do not take effect as RCRA requirements in States with initial authorization until those States revise their programs and EPA approves the changes. Refusing to approve such requests because they are late--or because another rule in the same cluster is deficient--would leave gaps in the protection of human health and the environment. Even for rules promulgated under the 1984 amendments, EPA generally prefers to transfer authority to States as soon as practicable. Section 1003(a)(7) and early legislative history show that Congress also preferred States to implement the RCRA Subtitle C program.

Thus, we believe that the cluster rule does not limit EPA's authority to approve State program revisions after the deadlines expire. Furthermore, a gap in one cluster would not limit EPA's ability to approve a different cluster. The cluster rule simply puts States on notice that EPA may use its discretionary withdrawal authority after the final cluster deadline passes. We also do not believe that EPA's 1980 regulatory prohibition on partial programs at 40 CFR 271.21(h) precludes EPA from approving partial clusters. There is regulatory history which supports our interpretation that the prohibition on partial programs means States are prohibited from implementing RCRA programs that address only part of the universe of waste handlers,

e.g., "generators", "transporters", "treatment, storage and disposal facilities". This prohibition, therefore, would not be relevant to the great majority of program revisions, since any State program that has obtained initial authorization already addresses the full universe of waste handlers.

Although, the RCRA regulations do not prohibit EPA from approving late clusters or late and incomplete clusters, the rules do require states to revise their programs to reflect changes in the federal RCRA rules. EPA cannot allow a state to refuse to adopt a particular revision other than those less stringent revisions to the Federal program that are deemed optional. OSW and OGC strongly recommend that a Region that is approving a late and incomplete cluster ask the state to demonstrate that it still intends to adopt the missing rules by submitting an informal schedule that sets a target date for submittal of the missing provisions. The Region should note in the Federal Register the schedule the state has submitted detailing when it will submit the missing provisions. OGC believes that these schedules will significantly improve our ability to defend any challenges to individual approvals of late and incomplete clusters. Consequently, we request that Regions obtain state schedules for any provisions omitted from a late and incomplete cluster. If a state refuses to submit a schedule, or if a Region has other reasons for believing that a state cannot make a good faith commitment to continue to work toward the submission of a missing provision, the Region should contact the State and Regional Programs Branch of OSW for further guidance.

Availability of Information under RCRA §3006(f)

A related issue has also arisen regarding the 1984 provision at §3006(f) of RCRA that requires a State to make available to the public information it has obtained regarding hazardous waste management to the same extent that EPA would if it were implementing the RCRA program in that State. This section also provides that no State program may be authorized by EPA unless it meets these requirements. EPA has interpreted this provision to require States to adopt rules very similar to EPA's regulations implementing the Freedom of Information Act (FOIA). When EPA promulgated the cluster rule in 1986, it placed the public information requirement in the cluster with the earliest deadline ("Non-HSWA I" -- due date of July 1986).

A number of States have failed to submit timely revisions addressing these information requirements. Often, requirements governing access to information are located in a State's general administrative code applying to all State agencies. This complicates the process of adopting needed statutory or regulatory changes. Also, the current statutory interpretation requiring compliance with most aspects of EPA's FOIA rules compels States to expose their strained budgets to significant financial resource drains.

EPA believes that the statutory public information requirement should be treated in exactly the same way as any regulatory revision promulgated by EPA. Thus EPA has approved several of the "Non-HSWA I" clusters that lacked public information programs both before and after the last deadline extension. This approach is an application of EPA's authority to approve pieces of clusters in States lacking public information programs in the same way that it approves partial clusters for States that lack analogs for other EPA regulations. Indeed, EPA's approach to

the public information requirements reflects Congress' intent that §3006(f) be treated "'in the same manner" as any EPA rule revising the RCRA program. (Note, however, that any State applying for RCRA initial authorization--base program authorization--must comply with the deadline for the public information requirement.)

We recognize that earlier EPA guidance (specifically, J. Winston Porter's memorandum of August 22, 1986 and the current version of the State Authorization Manual (SAM)) contains statements that appear to be in conflict with the interpretation of §3006(f) set out in this memorandum. To the extent that the earlier guidance is in conflict, the policy elaborated in this memorandum supersedes the earlier guidance.

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